Nos. 80-231,
79-1538 and 79-1596

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY
OF THE INTERIOR, *et al.*,
Appellants,

vs.

STATE OF INDIANA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant (No. 79-1538),
Appellee (No. 79-1596),

vs.

VIRGINIA SURFACE MINING AND RECLAMATION
ASSOCIATION, INC., *et al.*,
Appellees (No. 79-1538),
Appellants (No. 79-1596).

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF THE STATE OF ILLINOIS AS *AMICUS CURIAE* IN SUPPORT OF INDIANA AND VIRGINIA

TYRONE C. FAHNER
Attorney General, State of Illinois
Room 900
160 North LaSalle Street
Chicago, Illinois 60601
(312) 793-2501

HARVEY M. SHELDON
Special Counsel to the State of Illinois
One North LaSalle Street
Suite 2300
Chicago, Illinois 60602
(312) 346-7800

Attorneys for Amicus Curiae, The State of Illinois

MICHAEL J. DUFF
NISEN, ELLIOT & MEIER
Chicago, Illinois
Of counsel.

Printed by the Authority of the State of Illinois—1-81-200

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
ARGUMENT	3
I. The Constitution provides for a Federal government of limited powers, with important reserved rights to the states and people, which Constitutional balance must be maintained by this Court	3
II. Title V of the Act authorizes the Federal government directly or indirectly to exercise police power control over local affairs of private persons and the State, in excess of Congress' Constitutional authority under the Commerce Clause, and contrary to the Tenth Amendment	11
III. The provisions of the Act found to invade States' rights in the Indiana case will seriously interfere with the rights of the State of Illinois.	18
CONCLUSION	30
Appendix A	1a
Appendix B	3a
Appendix C	6a

TABLE OF AUTHORITIES

	Page
CASES:	
Gibbons v. *Ogden,* 22 U. S. (9 Wheat.) 1 (1824)....	8
In Re: Permanent Surface Mining Regulation Litigation, No. 79-1144 (D.D.C. May 16, 1980), *appeals docketed,* No. 80-1810 and consolidated case nos. 80-1811, 80-1812, 80-1813 and 80-1823 (D.C. Cir., August 20, 1980)	9, 21
In Re: Permanent Surface Mining Regulation Litigation (Peabody Coal Company, Appellant) No. 80-1308 (D.C. Cir. July 10, 1980), rehearing *en banc* ordered and pending.	9
In Re: Permanent Surface Mining Regulation Litigation, No. 79-1144, ____ F. Supp. ____, 14 E.R.C. 1083 (D.D.C. February 26, 1980) (Round I).	21
In Re: Permanent Surface Mining Regulation Litigation, No. 79-1144, ____ F. Supp. ____ (D.D.C. May 16, 1980). (Round II).	21
Marbury v. *Madison,* 5 U. S. (1 Cr.) 137 (1803). ...	10
Massachusetts v. *Mellon,* 262 U. S. 447 (1923).....	28
McCulloch v. *Maryland,* 17 U. S. (4 Wheat.) 316 (1819).....	4, 5, 10
Metcalf v. *Mitchell,* 269 U. S. 514 (1926).....	10
Mugler v. *Kansas,* 123 U. S. 623 (1887).....	15
National League of Cities v. *Usery,* 426 U. S. 833 (1976).....	8
New York v. *Miln,* 36 U. S, 102 (1837).....	6
New York v. *United States,* 326 U. S. 572 (1946) ...	17
Penn Central Transp. Co. v. *New York City,* 438 U. S. 104 (1978)	26
Warth v. *Seldin,* 422 U. S. 490 (1975)	23
Youngstown Steel and Tube Co. v. *Sawyer,* 343 U. S. 579 (1952).	10
CONSTITUTION, STATUTES AND REGULATIONS:	
Constitution of the United States	
Article Section 8 (Commerce Clause)	4, 5, 19
Tenth Amendment	17, 18, 19, 28

Statutes

	Page
Clean Air Act; 42 U. S. C. § 7401 *et seq.*	
§ 101(a) (3); 42 U. S. C. § 7401(a)(3)	16
Clean Water Act; 33 U. S. C. §1251 *et seq.*	
§ 101(b); 33 U.S.C. § 1251(b)	16
§ 101(g); 33 U. S. C. § 1251(g)	16
The Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 *et seq.*	
Title I, § 101(f); 30 U. S. C. § 1201(f)	9
Title IV	22
Title V	
§ 503; 30 U. S. C. § 1253	7
§ 505; 30 U. S. C. § 1255	19
§ 508(a); 30 U. S. C. § 1258(a)	24
§ 510(a); 30 U. S. C. § 1260(a)	11, 12, 24
§ 510(b)(6); 30 U. S. C. § 1260(b)(6)	11
§ 510(d)(1); 30 U. S. C. § 1260(d)(1)	24, 27
§ 512(a); 30 U. S. C. § 1262(a)	12
§ 513(a); 30 U. S. C. § 1263(a)	11, 24
§ 515(b)(2); 30 U. S. C. § 1265(b)(2)	12, 24
§ 515(b)(3); 30 U. S. C. § 1265(b)(3)	12
§ 515(b)(7); 30 U. S. C. § 1265(b)(7)	12, 26
§ 515(b)(15); 30 U.S.C. § 1265(b)(15)	12, 24
§ 515(b)(16); 30 U.S.C. § 1265(b)(16)	12
§ 515(b)(17); 30 U.S.C. § 1265(b)(17)	12
§ 515(b)(19); 30 U.S.C. § 1265(b)(19)	12
§ 515(b)(20); 30 U.S.C. § 1265(b)(20)	12
§ 515(b)(21); 30 U.S.C. § 1265(b)(21)	12
§ 515(b)(23); 30 U.S.C. § 1265(b)(23)	12, 13

Page

§ 515(b)(24); 30 U.S.C. § 1265(b)(24). 12, 13
§ 515(c)(3); 30 U. S. C. § 1255(c)(3).... 13
§ 516; 30 U. S. C. § 1266 13
§ 519(c)(2); 30 U. S. C. § 1269(c)(2).... 27
§ 522(a); 30 U. S. C. § 1272(a) 13, 24
§ 522(c); 30 U. S. C. § 1272(c) 13

Illinois Revised Statutes (1979)
Ch. 96½, par. 156 13
Ch. 96½, par. 251 *et seq.* 18
Ch. 96½, par. 4001 18
Ch. 96½, par. 4101 18
Ch. 96½, par. 4401 *et seq.* 13, 18
Ch. 96½, par. 4507 23
Ch. 96½, par. 7901 *et seq.* 18
P.A. 77-1568, approved and effective Sept. 17, 1971 18

Regulations

Code of Federal Regulations
30 CFR § 730.5 9
30 CFR § 731.13(c) 9
30 CFR § 785.17(d)(1) 21, 24
30 CFR Part 816 21
30 CFR Part 817 21
30 CFR Part 823 21
30 CFR § 823.11(c) 20
30 CFR § 823.15(b) 20, 23
30 CFR § 823.15(c) 20
30 CFR § 823.15(e)(1) 23

Page

Illinois Surface-Mined Land Conservation and Reclamation Act Rules and Regulations

Rule 1104 ..... 18, 27, 28

MISCELLANEOUS:

Brief of Appellant State of Illinois, dated November 3, 1980, *In Re: Permanent Surface Mining Regulation Litigation,* No. 80-1810 and consolidated casenos. 80-1811, 80-1812, 80-1813 and 80-1823 (D. C. Cir.) 21

Brief for the Secretary of the Interior as Appellee and Cross-Appellant, dated December 23, 1980, *In Re: Permanent Surface Mining Regulation Litigation,* No. 80-1810 and consolidated case nos. 80-1811, 80-1812, 80-1813 and 80-1823 (D.C. Cir.) 20

Coal Extraction and Utilization Research Center, Southern Illinois Univ.-Carbondale, *Final Report: The Economic Impact of Western Coal in Illinois* (June 22, 1979) 24, 25

126 Cong. Rec. S 11279 (daily ed. August 20, 1980) 27

P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* (2d ed. 1973) 4

The Federalist No. 42 (J. Madison), Modern Library ed. 5

The Federalist No. 44 (J. Madison) Modern Library ed. 9

The Federalist No. 45 (J. Madison), Modern Library ed 5, 6

The Federalist No. 46 (J. Madison), Modern Library ed. 3

Page

44 Fed. Reg. 15311-15463 (March 13, 1979) 9
Ill. Exec. Order No. 4 (1980) 27
Letter containing non-binding statement of issues to be raised on appeal, from the Justice Department to Christine N. Kohl, Chief Staff Counsel, U.S. Court of Appeals for the District of Columbia Circuit (September 29, 1980) 20

Nos. 80-231,
79-1538 and 79-1596

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY
OF THE INTERIOR, *et al.*,
Appellants,

VS.

STATE OF INDIANA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant (No. 79-1538),
Appellee (No. 79-1596),

VS.

VIRGINIA SURFACE MINING AND RECLAMATION
ASSOCIATION, INC., *et al.*,
Appellees (No. 79-1538),
Appellants (No. 79-1596).

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF THE STATE OF ILLINOIS AS *AMICUS CURIAE* IN SUPPORT OF INDIANA AND VIRGINIA

STATEMENT OF INTEREST

At stake in this case is Congress' undertaking of a fundamental governmental role, not ever exercised before in like manner by the United States, which properly belongs to states and localities: the governmental role of land use designation for privately owned lands. If this Court allows Congress to determine whether land may be mined and to designate land use for land which has been mined, premised on what the

Indiana Court below properly found to be a trivial percentage of the acreage of concern, the precedent will be established for Congress to designate land use for any land, anywhere in the nation. If Congress may designate land use and handling for reclaimed land from which coal is mined, Congress may presumably seek to make land use decisions for land from which corn, soybeans, cattle, timber, cotton, and any other product of the land are taken and sent into the stream of commerce. If coal, which is taken from 5,000 to 6,000 acres of Illinois' land annually, affects interstate commerce substantially to warrant Congressional decree of land uses and handling, then all the more substantial an effect will be made by grain, which comes from hundreds of thousands of acres of Illinois. It is also then not a great step to conclude that the use of land for any other purpose, be it housing, recreation or cemeteries, affects interstate commerce, and is thus governable by Congress. If the decisions below finding provisions of this Act to be violative of the Tenth Amendment are reversed, there is no clear or perceivable limit to the authority of Congress to designate and regulate the use of lands owned by private individuals.

Illinois produces vast amounts of grain and livestock, as well as a large amount of coal. Its citizens live in a diversity of environments, both rural and urban, and are free to choose to live in counties where zoning is not employed and cities where it is a strict and innovative device in the public interest. Illinois' government, and its local governments, have traditionally functioned as designators of land use. The Surface Mining Act, while displacing them from this role, thereby absorbs on behalf of the Federal government one of the powers which has traditionally made state and local governments viable, and useful, members of a federal system. The provisions of the Surface Coal Mining and Regulation Act stricken by the Courts below make government less responsible to the people it affects, and seriously impair the ability of state governments to protect and provide for the welfare and prosperity of their citizens. Illinois therefore files this *amicus curiae* brief in support of its sister states, Indiana and Virginia.

ARGUMENT

I. The Constitution Provides for a Federal Government of Limited Powers, With Important Reserved Rights to the States and People, Which Constitutional Balance Must Be Maintained by this Court

This case obviously presents fundamental questions concerning the scope, distribution and balance of governmental power under the Constitution. The State of Illinois files this *amicus curiae* brief, not as a rival or enemy of the Federal government, but as a partner in a public trust, held by government for the people. This trust and its exercise are verbally embodied in the Constitution. James Madison explained the meaning of this trust:

> *The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes.* The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must be here reminded of their error. They must be told that the *ultimate authority* wherever the derivative may be found, *resides in the people* alone, and that it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of others. Truth, no less than decency, requires that the event in every case should be supposed to depend on the sentiments and sanction of their common constitutents. *The Federalist* No. 46 (J. Madison) Modern Library ed., p. 305. (emphasis added).

Given this premise, it is incumbent on the Supreme Court to confine the federal exercise of its trusteeship to that delegated by the people in the Constitution and to assure the reserved rights of the states and people to be free of federal regulation of their property and local affairs and to have the

benefit of state government in meaningful form. Rather than being simplistic, a resort to first principles is helpful in analyzing this case to a balanced and beneficial conclusion.[1]

This Court has historically recognized the need to provide judicial determination of the balance and distribution of power in our federal system. In this case, as in the past:

> The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty. *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 400 (1819).

One serious issue posed by this case is whether, logically, as a matter of constitutional law, the "part" (in this case "commerce among the states") under Art. I, Section 8, can swallow the "whole" of commerce, including local affairs. In other words, if use of private lands can be dictated by Congressional law, what then is left as a clear example of "local activity" that is not a part of "commerce among the states" and subject to Congressional regulation? The issue clearly is not whether the Commerce Clause can rationally be related to the subject matter of the Surface Mining Act. It would appear "rational" to define interstate commerce in such a way as to relate virtually

---

[1] For an expanded discussion of historic principles of the intent and need for a strong federal judiciary empowered to arbitrate state and federal disputes, see P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System,* pp. 9-32 (2d ed. 1973).

any event in the United States, directly or indirectly, to interstate commerce; but such rationality is inconsistent with good sense and the intent of the Constitution.

It should be quite clear that the drafters of the Constitution had no idea the Commerce power could be as extensive as it has been held to be, so as to eliminate as a practical matter, the concept of activities that are beyond the scope of the Commerce Clause. Without denying that the complexity of modern society makes an expansive view of Commerce Clause authority an accepted necessity, that same complexity cannot substitute for reliance by the States and people on their Constitution to provide government limited to its enumerated powers and reasonably controlled and controllable by judicial review under the Constitution. *Cf. McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 405 (1819).

The power granted by Art. I, Section 8 of the Constitution "to regulate commerce . . . among the several states, and with the Indian tribes", was intended as one providing "for the harmony and proper intercourse among the States" in the context of assuring against indirect assessment of duties and assuring that the "reciprocal trade of confederated States" did not devolve into animosities among states. It was also seen as a necessary supplement to regulation of foreign commerce. *The Federalist* No. 42 (J. Madison) Modern Library ed., pp. 273-275. In contrast, the writers of the Federalist papers stated a belief that state governments would have extensive inherent powers:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. *The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and*

> *properties of the people, and the internal order, improvement, and prosperity of the State. The Federalist* No. 45 (J. Madison) Modern Library ed., p. 303. (Emphasis added.)

The commerce power, while "new" to the federal government, seemed to Mr. Madison "an addition which few oppose and from which no apprehensions are entertained." *Ibid.*, p. 303. And even more importantly, state governments possessed and had reserved broad authority to provide internal order, improvement and prosperity to their citizens. *Cf. New York* v. *Miln*, 36 U.S. 102 (1837).

Thus, the second issue of importance posed here involves the extent and meaning of the reserved rights of states to provide, in Madison's words, for their "internal order, improvement and prosperity". Virginia and Indiana have compellingly shown in the district courts how disruptive and damaging certain provisions of the Federal Act are to their economy and their ability to provide land use plans and other services for the betterment of their citizens. Local expectations and needs for housing are interfered with, jobs and the use of private land resources are threatened in ways which the local community cannot reasonably alter or affect. As will be more fully developed in Part III of this *amicus curiae* brief, Illinois' government and citizenry are similarly threatened by portions of the Act which effectively outlaw or make uneconomic the development of coal resources. Coal development provides the lifeblood of many Illinois communities, yet affects relatively small acreage in the State. Also, the ability of the Congress to "federalize" prime farmland threatens Illinois agriculture and farmers with a loss of control of the use of their property.

This Court should be aware, if it is not already, that numerous states have at one time or another strongly criticized the administration of the Federal Surface Mining Act. In a

resolution[2] unanimously adopted May 22, 1980, sixteen coal mining states of the Interstate Mining Compact resolved:

RESOLUTION

INTERSTATE MINING COMPACT COMMISSION

BE IT RESOLVED BY THE INTERSTATE MINING COMPACT COMMISSION (IMCC): that the federal domination and control over state and local land use and coal resource development, as contained in the "Surface Mining Control and Reclamation Act of 1977" (P.L. 95-87), and regulations thereunder, must be corrected by the Congress, and this authority must be restored to the states and local governments;

---

[2] This resolution was adopted by authorized representatives of the Governors of the following states: Texas, Alabama, Illinois, Tennessee, Maryland, Ohio, Oklahoma, Pennsylvania, South Carolina, Virginia, West Virginia, Kentucky, North Carolina, Indiana, Arkansas and Louisiana.

As of year end only 11 states had approved permanent programs. Of these, 6 were Western states, and 2 had few or no coal mines. Thirteen additional important coal states had submitted proposals for a permanent program which have been partially or wholly disapproved. Illinois is in this category. These states were required by the Act to resubmit revised programs in 60 days or lose program eligibility until after federal programs are imposed. Permanent programs for only 5 of these 13 states were resubmitted to the Secretary within the 60 days; resubmittal by the other 8, on information and belief, has been enjoined by state courts. See Section 503(d), 30 U.S.C. § 1253(d). Six additional states (none with a significant coal mine industry) either have not submitted a state program or have requested a federal program. Federal programs are being implemented for those 6 states. Nineteen states neither have coal mines or plans to produce coal in the future. It is misleading to look at the number of states which have submitted programs as evidence of the reasonableness of the provisions of the Act since many states have done so under the threat of federal imposition of a program. In this regard, most of the states which have submitted a program have expressed the view at one time or another that the Act is a threat to their sovereignty.

AND BE IT FURTHER RESOLVED THAT:

the intrusion of federal power into this area of state responsibility is a threat to representative government and state sovereignty.

Issued this 22nd day of May, 1980.

The issues posed in this case do not call for judicial interference or second-guessing of the Congress on what its laws ought to be.[3] The statute in question is generally quite clear and specific, and it provides at specific points for federal authority over private lands of unprecedented scope and detail.

---

[3] Some opinions of this Court contain expressions that in a representative government such as ours, the sole restraints on the Commerce power lie within Congress. For example, it has been said "the wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse." *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), (dissent quoting *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 197 (1824)). Illinois respectfully submits that where Tenth Amendment issues are involved, unless the Court is prepared to protect Tenth Amendment rights, their reservation in the Constitution is rendered a practical nullity by this line of reasoning, and the reserved powers of States might as well not be mentioned in the Constitution, since all legislative power, including traditional state police powers, would be effectively vested in the Congress, subject to exercise at its whim alone. Reference is made to the synopsis of the Court's rightful role in deciding these issues by Professor Mooney, page 8, note 2, Brief *Amicus Curiae* of Pike County, Kentucky, in the Virginia case (79-1538). The involvement of land use, a traditionally recognized area of state concern, in a Congressional statute should be an immediately suspect exercise of power, and should authorize federal courts to recognize the interest of a state in providing for its local welfare and prosperity. Whether as an absolutely reserved area immune from Congressional control, or an area of interest to be weighed in a balance with Congressional interest, the Courts have a necessary role in providing protection to the States and their citizenry from Congressional interference in land use, a key element of property rights and basis of state government tax and other internal policies.

The issues posed are fundamental issues of judicial review, as basic as the Constitution itself, calling into question whether Congress has, in Madison's words "misconstrue[d] [a] part of the Constitution and exercise[d] powers not warranted by its true meaning".

> In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; *The Federalist* No. 44, Modern Library ed., p. 295.[4]

---

[4] Illinois believes that sensitive Executive implementation of the Act would greatly have relieved the practical difficulties most states face with the Act. The Act includes a finding that:

> because of the diversity of terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface mining and reclamation operations subject to the Act should rest with the States. § 101(f); 30 U. S. C. § 1201(f).

Despite this finding, the Secretary of Interior chose to issue a comprehensive set of detailed regulations, 44 Fed. Reg. 15311-15463 (March 13, 1979), amplifying and making more detailed every requirement of the Act and requiring states to have regulations "no less stringent" than his regulations (30 CFR 730.5). If a state could demonstrate that it had a better alternative for any provision, based on local differences, it could submit them under the so-called "state window" provision (30 CFR 731.13(c)). The United States Court of Appeals for the District of Columbia has described the "state window" as a "one-way mirror." *In Re: Permanent Surface Mining Litigation* (Peabody Coal Co., Appellant), No. 80-1308, (D.C. Cir., July 10, 1980), Rehearing *En Banc* Ordered and Pending. The adopted regulations of the states which have already obtained federal program approval, and the lists of problem areas of state submittals for states which have not yet obtained approval, support this description. The State of Illinois is appealing the Order of the District Court upholding the idea that Congress intended a federally dictated set of regulations to govern state programs. *In Re: Permanent Surface Mining Regulation Litigation,* No. 79-1144 (D.D.C. May 16, 1980), appeal docketed, No. 80-1810 and consolidated case nos. 80-1811, 80-1812, 80-1813 and 80-1823 (D.C. Cir., August 20, 1980).

Although reversal of the District Court on the issue of primary responsibility for the regulation under the Act would alleviate matters, a limited number of direct land use requirements of the Act concerning restoration of approximate original contour, prohibitions and conditions on the use of particular land, including prime farmlands, for mining, and approval of post-mining land use remain and pose serious unconstitutional threats to Illinois, as well as to Indiana and other Midwestern coal states.

Where a clash between the federal Congress and the rights of the people and states to provide for their local affairs and prosperity are involved, the issue can be no less susceptible to judicial review than in cases where rights of private parties are injured by executive or legislative power, or states interfere with Federal law, e.g. *Marbury* v. *Madison,* 5 U.S. (1 Cr.) 137 (1803), *Youngstown Steel & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819), *Metcalf* v. *Mitchell,* 269 U.S. 514 (1926).

The District Courts below were both sensitive to the interests of state and federal government, and, after trial on the merits, concluded that in important respects, Title V of the Act oversteps the Commerce power and invades the reserved powers of the states. This Court should have no hesitancy in affirming the District Courts, which acted as intended by the Constitution to limit federal authority to the powers granted thereunder.

II. Title V of the Act Authorizes the Federal Government Directly or Indirectly to Exercise Police Power Control Over Local Affairs of Private Persons and the State, In Excess of Congress' Constitutional Authority under the Commerce Clause and Contrary to the Tenth Amendment

The Secretary asserts that the Act is properly preemptive of State law and that states' integral functions are not necessarily affected thereby.[5] Thus, one of the more useful ways to analyze the Virginia and Indiana cases is to consider the effect of Title V in a state that does not choose to submit a program, or fails to submit an approvable one. Under the standard constitutional theory relied on by the Secretary in his brief, Congress need not have given the States an opportunity to undertake the program and could, if it wishes, empower the Secretary to preempt the field of regulation of the subject matter. In this view of the case, Congress has created the OSM to exercise preemptive and primary jurisdiction over surface and underground coal mining, in a State that fails to submit an approvable program, and the OSM will be the regulatory authority in such a state.

If that occurs, then the following effects necessarily follow, as a legal matter:

1) The Federal government decides whether coal can be mined in a State and issues mining permits under § 510(a).

2) In cases where the mineral estate has been severed from the surface estate,[6] the surface-subsurface relationship is determined in accordance with State law (as shown to the satisfaction of the Federal government), provided that the regulatory authority would not "adjudicate" property rights disputes. § 510(b)(6).

---

[5] Secretary's Brief in the Virginia case (Nos. 79-1538 and 79-1596), pp. 26, 31.

[6] Illinois believes this is the case in most instances in Illinois. Operators normally lease the surface estate for the period required to extract the coal, and either pay a set fee per acre or a fee based on the quantity of coal extracted.

3) The Federal government finds in writing, whether the operator whose coal is overlain with prime farmland has technological capability to restore the land to equivalent agricultural yield levels after mining and to comply with performance standards in § 515(b)(7). The government in any event determines what farmlands are "prime" and subject to this special protection.

4) The Federal government decides on the rules that govern exploration for coal. § 512(a).

5) The Federal government notifies the local government in the locality (not the State), and otherwise deals directly with them in processing permits. §§ 510(a), 513(a).

6) The Federal government enforces the requirement that land be restored to a condition capable of supporting its prior uses, or higher and better uses. § 515(b)(2).

7) The Federal government decides on exceptions to approximate original contour of private lands in accordance with "an ecologically sound *land use*". § 515(b)(3).

8) The Federal government insures that all explosives at the mine are used in accordance with federal and State law and that notices to persons within one half mile thereof are given. § 515(b)(15).

9) The Federal government insures "that all reclamation efforts proceed in an environmentally sound manner." § 515(b)(16).

10) The Federal government enforces a requirement that access roads do not damage public or private property. § 515(b)(17).

11) The Federal government approves postmining land use. §§ 515(b)(19), 515(b)(20), and 515(b)(21).

12) The Federal government enforces all performance standards of Section 515, respecting soil handling, waste piles, impoundments, etc. Mining companies may be

required to meet "such other criteria as are necessary to achieve reclamation in accordance with the purposes of this Act, taking into consideration the physical, climatological, and other characteristics of the site; and to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable". §§ 515(b)(23) and (24).

13) The Federal government decides on the manner of mountain top restoration land use based on whether an "equal or better economic or public use" will be achieved. § 515(c)(3).

14) The Federal government regulates all surface effects of underground mining. § 516.

15) The Federal government decides what lands in a state are to be designated unsuitable for mining, and may declare unsuitable for mining any lands inconsistent with farms, woodlands or other renewable resource use on the surface as found by the federal government to be prudent. § 522(a) and (c).

From the above review it should be apparent that the overall effect of OSM's exercise of authority is to supplant the states and private persons in the supervision of the use and development of privately owned land and to regulate the conduct of mining with respect to what are, overwhelmingly, local effects. Mining (as distinguished from the sale of mined coal) is essentially a use of real estate,[7] and, except as adverse effects on waters of the United States or the ambient air quality relatable to national air quality standards can be found, the

---

[7] In many instances, mining is the only use of an interest in real estate, viz. where the mineral rights, are owned separately from the surface rights, which is a common occurrence. This property is governed by state law. *Cf.* Ill. Rev. Stats. (1979), Ch. 96½ Pars. 156, 4401.

activity is strictly local. Rather than set air emission or water discharge limitations relatable to environmental quality that affects commerce beyond the mine, the very conduct of land use and handling is directly regulated by the above cited provision in Title V, and the future use of land is provided for. Thus, the regulation of the subject matter is not of commerce, but of local activity, including not only mining but permission to use land for mining and regulation of postmining land use.

The precedent set by upholding the authority asserted by the Secretary of Interior in this case would logically lead to a conclusion that the Federal government can determine not only local land use, but also how local land use decisions are made. This will enable Congress to displace and override local land use decisions and authorize and supervise the conduct of industry, or local housing patterns, not because they threaten the public and environment in a manner that impedes on interstate commerce, but because they may have only a trivial "ripple" effect on interstate commerce. As found by the District Court in the Indiana case, only a trivial percentage of national agricultural product is affected by surface coal mining.

If the challenged provisions of the Act are upheld, no significant amount of coal can be mined without the federal government's permission, and in accordance with detailed standards set by the government in the Federal Act and the Secretary's rules. Thus, the question is posed by this case of the extent to which the Federal government can effectively take over the conduct of an entire basic industry,[8] and at the same time, supplant private owners and local and state governments to decide issues of land use.

---

[8] The Secretary's briefs repeatedly refer to coal mining as if it were a "public nuisance" subject to very stringent controls or even abolition. See, e.g., Secretary's Brief in the Virginia case (Nos. 79-1538 and 79-1596), p. 55. Illinois does not dispute that surface coal mining is often accompanied by temporary significant local changes, or that, if improperly managed, it can pose undesirable threats of a long term type. However, as shown at trial, agriculture itself has

Footnote continued on following page.

The Secretary's brief passes off the question of Congress' asserted power as more or less routine. It cites cases upholding the right of Congress to regulate for "environmental" reasons.[9] Not unlike the concept of interstate commerce itself, "environmental" concerns are ubiquitous, and can be rationally extended and related to every human activity. This Court must not let the necessary goals of environmental protection, which are shared by every state and a majority of the populace, substitute for analysis of the central issue—whether under our system of laws the Commerce Clause of the Constitution extends to the declaration of areas of states unsuitable for given use, and to the determination that certain privately owned lands and minerals may or may not be used at all, or except on conditions imposed directly or indirectly by the federal government for the handling and postmining use of the real estate on which the mine is located.

Contrary to the Government's assertions, the authority of the Government to make land use decisions is not the same as that asserted in the nation's major environmental protection laws. The Clean Water Act, although revised a number of times since its initial passage, has consistently been administered

---

Footnote continued from preceding page.

adverse environmental effects on water quality. If coal mining is a "nuisance", and thereby subject to strict control by the federal government, then no basic industry or farm in this country is safe from total federal control. Neither *Mugler* v. *Kansas,* 123 U.S. 623 (1887), nor any other case upholds such power in Federal hands.

The Federal government's attempt to seize control over coal mining appears especially objectionable when one considers that the Federal government owns and the Secretary of the Interior controls vast amounts of coal in the Western states. In many instances this Western coal competes with coal produced in Illinois and other Midwestern states. By imposing unreasonably stringent prime farmland reclamation requirements on Midwestern coal producers, which requirements are not applicable to Western mines because they are not located on prime farmlands, an unscrupulous Federal government could discourage Midwestern coal mining and place its coal resources in a favorable competitive position. See also, note 19, *infra.*

[9] See Secretary's Brief in the Virginia cases (No. 79-1538 and 79-1596), p. 25, note 13.

> . . . to recognize, preserve and protect the primary responsibilities and rights of the State to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. . . . 33 U. S. C. § 1251(b); also
>
> It is the policy of Congress that the authority of each to allocate quantities of water within the jurisdiction shall not be superseded, abrogated or otherwise impaired . . . 33 U. S. C. § 1251(g).

With respect to the Clean Air Act, Congress found specifically that urbanization has resulted in mounting dangers to public health and welfare, but that:

> "the prevention and control of air pollution *at its source* is the primary responsibility of State and local governments." 42 U.S.C. § 7401(a)(3) (emphasis added.)

The cases cited by the Government do not change the picture of states being the responsible agencies with respect to local land use and economic development decisions. The states are given meaningful responsibility to decide the precise mix of controls they will insist on to achieve the national ambient air quality standards.

Illinois does not question Congress' power to set valid air or water pollution discharge regulations for the mining industry. Thus, to the extent necessary to control such effects, Title V is presumably valid. However, a review of Title V shows that effects other than air and water pollution control are its main focus. If air or water discharge standards were all that is involved, the Title could be reduced to a few paragraphs of text. The Act contains soil handling techniques and revegetation requirements which concern themselves with local impacts. It also makes direct land use decisions. As such, these are inherently suspect exercises of Congressional commerce clause power at least where their exercise can be shown to usurp or directly affect state police power functions, or make the delivery of state services difficult.

The Congress, in asserting what is effectively a power to "zone" the United States, imposes on particular states and individuals, by action of representatives elected from other states,[10] a fundamental diminution of their right to use real property (or mineral rights) which they possess. Effectively, ownership and control of energy resources will have been shifted from private hands into the hands of United States government officials. Private ownership will not be a right to reasonable use of property, but a mere privilege to request government permission to make any use thereof. Illinois urges this Court to reject a future that so places the populace and its general welfare at the mercy of big government. The Secretary asserts that this Court is bound to uphold any law for which there is a "rational" basis of connection with regulation of interstate commerce. This argument, extended to its ultimate conclusion in this case, has drastic and dangerous results for the future of the people of this country.

> To press a juristic principle designed for the practical affairs of government to abstract extremes is neither sound logic nor good sense. And this Court is under no duty to make law less than sound logic and good sense. *New York* v. *United States,* 326 U.S. 572, 577 (1946).

The exercise by the Federal government of the powers granted in Title V deal predominantly with local affairs of land use. Even if land use authority is not viewed as "exclusive" with the States, the attenuated basis for assertion of commerce power in this controversy clearly exceeds Congress' authority, and improperly invades important state rights reserved by the Tenth Amendment.

---

[10] Representatives of local government are generally the individuals who have zoning power, if such power is granted by state legislatures. If a state were to perform a statewide zoning function, local citizens at least have a realistic means of controlling the exercise of that power at the ballot box. On a national scale, certain states with resources Congress finds valuable effectively become subject to treatment as special zones or provinces of the Congress, with no countervailing compensation or practical means of controlling the process at the ballot box because the adverse economic or other effects are borne not by Congress, but by the locality. These effects include jobless pay, welfare, lower property, sales, income and severance taxes, etc.

III. The Provisions of the Act Found to Invade States' Rights in the Indiana Case Will Seriously Interfere With the Rights of the State of Illinois.[11]

The State of Illinois probably has more at stake in the outcome of this case than any other state of the Union. Illinois ranks third in the nation in number of acres of prime farmlands and contains an abundance of proven recoverable bituminous coal reserves. Illinois' policy, law and regulation is dedicated now, as it was prior to enactment of the Surface Mining Control and Reclamation Act of 1977 (the "Act"), to the maximization of the benefits of these resources and the minimization of harm to its citizenry from their use.[12]

If the judgment of the Federal District Court of the Southern District of Indiana should be overturned by this Court on the basis that the Constitution allows Federal government control over private land (including private mineral resources) and the post-mining land use of land in a state, then the right and sovereignty of the State of Illinois and its local citizenry and municipalities to determine land development and use within their borders will be mortally wounded. At least 9 million acres of Illinois prime farmland would be effectively subjected to the status of a federal province, and Illinois and its

---

[12] Illinois has regulated coal mining since 1874, and the reclamation of surface coal mines since 1971. P.A. 77-1568, eff. Sept. 17, 1971. It has issued mining permits and required compliance with stringent farmland reclamation requirements since prior to passage of the Federal Act. Illinois Surface-Mined Land Conservation and Reclamation Act Rules and Regulations, Rule 1104. State regulation of coal mining is comprehensive. See Ill. Rev. Stats. (1979), Ch. 96½ §§ 251 *et seq.*, 4001, 4101, 4401, 4501, *et seq.*, 7901 *et seq.*

[11] The Indiana case is emphasized by Illinois because Indiana's facts and interests are closer to Illinois' than are the steep slope concerns dealt with in the Virginia decision. Illinois supports affirmance of portions of the Virginia decision appealed by the Secretary, and, remand of the portion appealed by Virginia for a determination of those sections which interfere with the State's rights this Court finds protected by the Tenth Amendment.

citizens would be deprived of their reserved rights under the Tenth Amendment to the Constitution of the United States. For these reasons, Illinois supports the State of Indiana and the Commonwealth of Virginia.

The positions urged herein are based upon the premise, expressed at length in the trial Court's decision in the Indiana case (Slip Op. pp. 22-25), that the prime farmland provisions of the Act, which were found below to exceed the Commerce Clause power and to invade the Tenth Amendment, will be imposed by the Department of the Interior within the state in any event. The provisions will be imposed directly, in the event a state does not seek or obtain program approval from the Secretary of the Interior, or indirectly, and subject to federal control, in the event a state program is authorized. Illinois supports a strong, independent state legislative effort to require land preservation and reclamation by coal mining operations, which effort might, in the judgment of state officials and the State General Assembly, include some or all of the same or similar provisions invalidated by the Court below as requirements improperly imposed by the Federal government upon states and their citizens.

Federal designation of land use of reclaimed prime farmland, and determination of lands which are unsuitable for coal mining, will impair the integrity of Illinois' state and local governments, and will diminish their ability to function effectively in a Federal system. The most fundamental loss to Illinois and its citizens that arises from the provisions held unconstitutional below is the ability for the State independently and freely to make its own laws on the subject of the use of its resources and land use within its borders. Under the Act, all Illinois' laws on the subject of coal mining and coal mined land reclamation become subject to the scrutiny of the Secretary of Interior. See Act, § 505, 30 U.S.C. § 1255. While the Commerce and Supremacy Clauses of course enable federal legislation to occupy the field of a subject of interstate commerce, this case represents the well-documented judgment of a

federal district court, after full trial, that certain of the requirements imposed by Congress on coal mine operators are directed at a subject having at best a trivial impact on interstate commerce: the handling, replacement and post-mining land use of certain farmlands defined as "prime" because of their favorable crop production capacity and historical use, and the designation of lands unsuitable for mining within a sovereign state.

The Surface Mining Control and Reclamation Act works a severe and disabling injury to the functioning of state and local government in Illinois because of the imposition of federal dictation of the special handling of prime farmlands, and a displacement of state decision making on the suitability of lands for mining.[13] Almost all Illinois coal mines (both surface and

---

[13] At page 23 of his brief, the Secretary attempts to indirectly refute what he characterizes as the "suggestions of the [Indiana] district court's opinion" that the Act regulates the post-mining use of mined lands by arguing that while the Act encourages the farming of prime farmlands, it does not mandate such use. In note 13 the Secretary further states that 30 C.F.R. § 823.11(c), § 823.15(b) and (c) of his regulations, which require that mine operators actually grow crops on prime farmlands during the post-mining reclamation period, were remanded by the United States District Court for the District of Columbia. The Secretary's statement is misleading and not completely accurate. First, the Secretary is actively appealing the District Court's remand of 30 C.F.R. § 823.15(b) and (c). Brief for the Secretary of the Interior as Appellee and Cross-Appellant, dated December 23, 1980, *In Re: Permanent Surface Mining Regulation Litigation,* No. 80-1810 and consolidated case nos. 80-1811, 80-1812, 80-1813, and 80-1823 (D.C. Cir., filed July 15, 1980) at 52-61, and Letter containing non-binding statement of issues to be raised on appeal, from the Justice Department to Christine N. Kohl, Chief Staff Counsel, U.S. Court of Appeals for the District of Columbia Circuit (September 29, 1980). Further, although the District Court remanded 30 C.F.R. § 823.11(c) and § 823.15(b) and (c) in the first of

Footnote continued on following page.

underground)[14] contain overlying prime farmland so as to bring the disputed provisions of the Act into play at almost every significant mine site.

Illinois suffers economically, and state government's delivery of services is directly affected, by the Act's prime farmland requirements. Although Illinois is the nation's fourth largest coal producer, Illinois coal is not very much in demand relative to other states' coal. Despite Illinois' vast reserves and their

---

Footnote continued from preceding page.

its seriatim decisions, *In Re: Permanent Surface Mining Regulation Litigation,* No. 79-1144, ____F. Supp.____, 14 E.R.C. 1083, 1106 (D.D.C. February 26, 1980), it upheld 30 C.F.R. § 785.17(d) (1) of the Secretary's regulations which requires as a condition for issuance of a mining permit covering prime farmlands that "[t]he approved post-mining land use of these prime farmlands will be cropland"; Round II Mem. Op. at 5-6 (May 16, 1980). Illinois currently is appealing that portion of the District Court's ruling. Brief of the Appellant State of Illinois, at 44-57.

[14] It is very important for the Court to realize that underground coal mining is being subjected by the Department of Interior to similar rules as surface mining. See Permanent Regulatory Program. 30 CFR Parts 816, 817, and 823. Very serious technical and legal problems occur as a result of this approach, including the impossibility of assuring restoration of land disturbed for the construction of facilities which will stand for several decades. Judge Flannery, in the judicial review case challenging the Permanent Program regulations found the Secretary to have been too facile in his application of identical rules to underground mines. Virtually all recovery of coal in Illinois is affected by these disputed provisions. Illinois argued unsuccessfully in the District Court that underground mines were not intended to be covered as lands "to be mined" under the Act, Section 510(d)(1), 30 U.S.C. § 1260(d)(1). *In Re: Permanent Surface Mining Regulation Litigation,* No. 79-1144. (D.D.C. 1980), appeal docketed, No. 80-1810 *et al* (D.C. Cir. August 20, 1980).

attractive heat value per pound, the relatively high sulphur content of its coal coupled with stringent air quality and emissions requirements applicable to its combustion have flattened demand for Illinois coal. The Federal Act, in Title IV, not directly at issue, imposes a severance tax on Illinois coal. Illinois' "share" of the moneys is withheld unless Illinois changes its laws to conform to federal law on the subjects complained of below. This abandoned mined land fund, while of great merit, thus collects the very same marginal severance taxes which the Illinois coal market might afford if imposed directly by the state and holds them "for ransom." Likewise, at this time, roughly two thousand miners are out of work in the Illinois coal fields, while another 400-600 are working short work weeks. Many more jobs are indirectly affected. In the past year, five large Illinois coal mines have closed. At least two of these closures are relatable in part to the implementation of the prime farmlands provisions complained of below. The burden of this unemployment is borne directly by Illinois' government, state and local, in the provision of welfare services and the erosion of income tax base. By federal dictation of the terms on which, and whether, coal shall be mined, Illinois' citizens, both the employed and the unemployed, are deprived of a direct voice in their economic and environmental destiny.

Only some 5,000-6,000 acres of Illinois lands are newly mined annually. All of this acreage is subject to prompt, strict reclamation under state law. By contrast, in 1979, some 327,000 farmland acres (not all "prime") were in voluntary "set aside" programs. The Federal government paid the owners of those lands more than $7 million not to grow crops. Even if Illinois' annual mined acreage were to double overnight, it still would require some 32 years to mine the land in Illinois set aside deliberately last year to alleviate low prices in the farm commodities markets. In fact, lands mined in Illinois are restored to their optimal use, and rowcrop quality lands must be restored to rowcrop capability under Illinois law.

Appendix A is an excerpt of relevant provisions of Illinois law in effect since 1975, well before the passage of the federal Act. Ill.Rev.Stats. (1979), Ch. 96½, par. 4507.

The State also has an interest beyond that of protecting the role of making land use designations. Rights of citizens of the State will be infringed if the prime farmland use provisions are allowed to stand.[15] By requiring a mine operator actually to use the reclaimed land as farmland until yields reach those of surrounding lands, the Act deprives the owner, who farms for a living, of the use of his property during the *time the operator must farm* the land.[16] The Secretary of the Interior has ruled that the Act allows preparation of the land prior to cropping to continue for up to ten years (30 CFR 823.15(b)) and to require at least three successive years of yield which are equivalent to yields from surrounding farms (30 CFR 823.15(e)(i)). This interpretation indicates that an owner's land could be occupied by the coal mine operator as many as thirteen or more years after mining and neither the Secretary nor the Act puts an absolute maximum time limit for compliance with the Act's requirement to reach equivalent yields other than "a reasonable time." Illinois believes an owner should not be deprived of the use of his land for such long periods of time. His land's use should not be designated by a national legislature constituted of representatives from all fifty

---

[15] In such a case, this Court has allowed one standing to assert the rights of third persons when enforcement of the challenged provisions against one would result indirectly in the violation of third parties' rights. *Warth* v. *Seldin,* 422 U.S. 490, 510 (1975).

[16] The State of Illinois has received inquiries from farmer-lessors about the length of time they must wait after mining before they may farm their land again. The Secretary's brief in the Indiana case (No. 80-231), p. 23, makes it appear that this issue of requiring crops to be grown is moot, because the District Court in the final judicial review of the regulations found this rule inconsistent with the Act. To the contrary, the Secretary persists in asserting this requirement by appealing this holding in a brief filed December 23, 1980. See note 13, *supra.*

states. Further, local governments should not be deprived of their traditional right to designate land use for the length of time which will be required to meet the Act's requirement.[17]

There are numerous examples of how the Act regulates or interferes with state governmental decisions. Illinois believes it should have freedom to decide in given cases that a mine is more important to a community than whether exactly 100 or more per cent of pre-mining crop yield is obtainable after restoration of the soil. See Section 510(d)(1). Illinois may not wish to approve post-mining land uses at the state level, as required by the Act, but instead to leave such decisions to local government and private owners. See Section 515(b)(2). Although Illinois may not object, a given state may not wish to structure its government such that a local governmental agency must have certain rights. See, e.g., Sections 508(a)(3)(8); 510(a); 513(a); 515(b)(2); 515(b)(15)(A). Neither should a process for land use planning be required of a State at the risk of federal intervention. See Section 522(a).

Reduced production of coal results from a number of factors, of course. However, it is undeniable that such reduced production can be expected because of unreasonably high costs imposed on Midwestern states, compared to Western mining that is not governed by the prime farmland rules struck down by the Indiana district court. For seven important Illinois mining counties, a Southern Illinois University study on the impact of Western coal in Illinois shows projected losses of as many as 2,592 direct mining jobs and 6,749 indirect job losses, for a total seven county loss of as much as $132,369,788 in total

---

[17] The constitutionality of the Secretary's rule requiring that where prime farmlands are proposed for mining "the post-mining land use of these prime farmlands will be cropland", 30 CFR § 785.17(d)(1), and related provisions interfering with state and local decisions on land use were challenged by Illinois in the judicial review case, but have been decided adversely to Illinois and are on appeal. See note 13, *supra*.

income by 1985.[18] Not only are local property tax revenues jeopardized, but serious burdens are imposed on the State in terms of lost income and sales taxes, increased demand for social welfare services, and reduced ability of the State to aid local government with rebates from sales and income taxes. States cannot be put at Congress' mercy because of Congressionally determined land use policies, without serious adverse effect on their ability to effectively govern and provide services to their citizens.

What especially concerns Illinois is Congress' apparent decision that prime farmland, once affected, must be returned to an actual use of crop production, regardless of the legitimate needs of its growing population as traditionally determined by locally chosen officials. One irony of the requirement of returning prime lands to cropland is that it removes from alternate use the very lands whose agricultural productive capacity is most in dispute. The faces of communities can change drastically over a ten to fifteen year period, and state and local governments should be allowed to provide for such changes so there will be no possibility of an operator's having to farm reclaimed land while a growing community expands around him and urbanization thereby occurs on unmined prime farmland in the surrounding area. In Illinois, almost 100,000 acres of prime farmland are taken out of crop production annually, including only 5,000 or 6,000 acres taken temporarily for the use of coal mining. In many communities in Illinois, there is no practicable choice of another type of land to be affected by expansion of communities and public roads and facilities.[19]

---

[18] The figures quoted assume continued heavy emphasis on Western coal, due in part to environmental restraints not at issue here. The Coal Extraction and Utilization Research Center, SIU—Carbondale, *Final Report: The Economic Impact of Western Coal in Illinois,* June 22, 1979, Table 11-17.

[19] The danger to Illinois from federal control of prime farmland use is not limited to its mining counties. Illinois contains an estimated

Footnote continued on following page.

Illinois is thus before this Court in less than the happy position of undoubtedly appearing to some of its citizens most concerned with the preservation of farmland and the values of community life associated with farming, to oppose good reclamation law. To the contrary, in fact, Illinois' government finds workable and reasonable as a police power measure, appropriate for a state to enforce, the substance of § 515(b)(7), 30 U. S. C. § 1265(b)(7), which includes the provisions for soil handling and reclamation of prime farmland properly found by the Court below to be outside of Congress' power to impose

---

Footnote continued from preceding page.

23.8 million acres of prime farmland and other farmland which is used to produce rowcrops. Approximately the southern two-thirds of Illinois is underlain by bituminous coal reserves; Illinois contains approximately twenty-five per cent of the nation's bituminous coal reserves. The total of estimated coal reserves in Illinois is 162 billion tons of which 30 billion tons, or roughly 1/8 of the nation's total recoverable coal reserves of all types, is recoverable under present technology. Of this 30 billion tons, about 30-40% is mineable by surface mining methods and the rest are mineable by underground mining methods. Prime farmlands cover at least 50 to 60% of the coal reserves in the state, and are interspersed so as to cover for practical regulatory purposes a much greater percentage of mined land.

Because of the large size of Illinois' coal reserves and other reserves underlying Indiana and Western Kentucky, one practical effect of allowing the Interior Department to prescribe land use controls that help keep this coal from the marketplace is to tend to give to the Interior Department monopoly power over coal resources. Much of the coal mined in the West is coal from federal lands or lands located such that federal lease rights control its being mined. Thus, without paying for the nation's largest energy supply, the federal government, by land use control, can effectively see to the maximization of federal profit from coal development. Thus, contrary to intimations in the Secretary's brief that the governmental action here is not "entrepeneurial" in character (Virginia Brief, pp. 53, 54), the Interior Department daily exercises an entrepeneurial judgment on behalf of the government respecting the development of vast coal and oil resources owned by the United States, and inquiry into its economic impact is imperative. *Penn Central Transp. Co.* v. *New York City,* 438 U.S. 104 (1978). For Interior Department entrepeneurial authority, See § 30 U. S. C. *passim.*

upon states and their citizenry. Illinois' own law served in part as a model for these provisions. Other provisions such as § 510(d)(1), 30 U. S. C. § 1260(d)(1), or § 519(c)(2), 30 U. S. C. § 1269(c)(2), contain desirable elements that are acceptable state police power measures if reasonably interpreted.

Illinois as a matter of state policy is committed to a long-term effort to secure and protect its natural bounty of prime farmlands against irreversible loss or degradation. Attached as Appendix B, is an Executive Order of Illinois' Governor, dated July 22, 1980, which confirms the policy of the State "to protect, through the administration of its current programs and regulations, the state's prime agricultural land from irreversible conversion to uses which result in its loss as an environmental or essential food production resource." In an official statement at a federal public hearing on the Illinois "permanent program" submittal, the Illinois Department of Mines and Minerals declared, in effect, that if court action (such as this) or other events result in a federal scheme of regulation less than adequate to protect Illinois' agricultural resources, it is prepared to work to assure such protection. Finally in Appendix C, there is reprinted a recent statement of Illinois' intent to protect prime farmland and other lands well suited to producing crops, as embodied in Rule 1104 (a Rule promulgated prior to the enactment of the Federal Act) which appears in the August 20, 1980 *Congressional Record* at pages S11279; we respectfully ask the Court to take judicial notice of these statements. Careful examination shows that in Illinois' mining counties, one million more acres of rowcrop lands are required, if mined, to be restored to their row-cropping capability than the Federal Act requires respecting prime farmlands. Thus Illinois assures greater total post-mining agricultural productive capacity than

that required by the Act, and this occurs by methods developed by experts costing significantly less per ton of coal than the preferred "federal" method.

Before the Act became law, Illinois was already strictly regulating surface mining within its borders. Among the most progressive of its regulations was Rule 1104, adopted in 1976, which prescribes topsoil removal, plus detailed requirements for a minimum 48 inches of root medium depth and texture of reclaimed land which was capable of growing rowcrops prior to its being mined. These requirements were developed by soils scientists with the particular goal of assuring adequate water holding capacity in the reclaimed soil to support rowcrops. They will continue to assure high quality immediate reclamation of coal mined lands.

Even if, for the sake of argument, Illinois or other states do not always provide the same rules and regulations for mining as are deemed fit by Congress, the Tenth Amendment must provide states with immunity from Congressional interference with land use decisions that so intimately involve local economies and affairs.

Whether federal bureaucracy enforces Congress' decree, or whether a State agrees to follow Congress' decree, at the risk of federal imposition of a program, does not alter the fact that Congress has removed from state and local legislative bodies their traditional authority to determine the most appropriate use of certain important lands within their jurisdiction according to their citizens' particular needs, as determined after those local citizens petition their local or state elected officials. Illinois would distinguish this statutory scheme from situations where eligibility to use a "carrot" of federal funds is contingent on adoption of a specific program. E.g., *Massachusetts* v. *Mellon,* 262 U.S. 447 (1923). While abuses also exist of the "carrot" approach, it is sufficient to note here that the complained of land control provisions are federally enforced in a state even if the state decides to pass up the "carrot". The provisions for

mandatory direct or indirect federal control of land use must be held to be constitutionally faulty, or else the structure of the federal system will have been shattered. Such a holding will preserve a balanced federal system, and nothing therein would prevent Congress from passing a law using economic or other incentives to induce states, voluntarily, to adopt the measures unconstitutional as here imposed.

CONCLUSION

It is imperative to the harmony of and future sensible government of the federal Union that this Court limit the reach of the Act complained of to subjects reasonably within the intent of the Commerce Clause, and affirm the District Court decisions below insofar as they find provisions of the Act to have violated the Tenth Amendment rights reserved to the States. As beneficial as many specific provisions of the Act may be in an abstract sense, the effect of vesting land use control authority in Congress to the extent provided in the Act is antithetical to the proper functioning of state and local government, and to the liberty of the people.

Respectfully submitted,

TYRONE C. FAHNER
Attorney General, State of Illinois
Room 900
160 North LaSalle Street
Chicago, Illinois 60601
(312) 793-2501

HARVEY M. SHELDON
Special Counsel to the State of Illinois
One North LaSalle Street
Suite 2300
Chicago, Illinois 60602
(312) 346-7800
Attorneys for Amicus Curiae, The State of Illinois

MICHAEL J. DUFF
NISEN, ELLIOT & MEIER
Chicago, Illinois
Of counsel.

January 9, 1981

APPENDIX

APPENDIX A

Illinois Law Requiring Restoration of Productive Capacity, Effective July 1, 1975

Ill. Rev. Stat., 1979, Ch. 96½, par. 4507. Duties of Operator

§ 6. Duties of Operator. Every operator to whom a permit is issued pursuant to the provisions of this Act may engage in surface mining upon the lands described in the permit upon the performance of and subject to the following requirements with respect to such lands:

* * *

(j) When the Director determines that the land to be affected is (1) capable of being reclaimed for row-crop agricultural purposes and suitable for row-crop agricultural purposes based on United States Soil Conservation Service soil survey classifications of the affected land prior to mining, and (2) when the Director determines that the optimum future use of the land affected is for row-crop agricultural purposes, the affected land shall be graded to the approximate original grade of the land provided that the final cut and submerged roadways may remain if the Department determines that such final cut or roadways could form a water impoundment capable of supporting desirable uses such as water for livestock or wildlife; and if to be used for fish life, shall have minimum depths in accordance with standards for fish stocking as recommended by the Department, and provided further that the box cut spoil shall be graded in accordance with subparagraph (a) of Section 6:

The reclamation requirements in this Section do not apply to affected land used for a sanitary land fill if such sanitary landfill is approved by the Environmental Protection Agency. The Environmental Protection Agency may regulate the amount of land to be used for the purpose and may establish a time schedule for the orderly and timely completion

of such sanitary landfill. Any affected land designated for sanitary landfill and not used for such purpose within 5 years is subject to the reclamation provisions of this Section;

On all affected lands to be graded to the approximate original grade under this subsection (j) all or part of the darkened surface soil, as defined in this Act, shall be segregated during the stripping process and replaced as a final cover as a last step in the required grading. When available in such depth, at least 18 inches of the darkened surface soil shall be segregated and replaced. When less than 18 inches of darkened surface soil exists all such lesser amounts shall be segregated and replaced. In no case under this subsection (j) shall less than the top 8 inches of surface soil, darkened or not, be segregated and replaced. This segregation and replacement requirement may be altered by the Department only if it is determined upon the advice of competent soil scientists that other material available in the cast overburden would be suitable in meeting the reclamation requirements. Below the darkened surface soil the replaced material shall be suitable as an agricultural root medium. The Department shall determine by rules and regulations what constitutes a suitable agricultural root medium of composition and depth. On all lands to be reclaimed under this subsection (j), the operator shall not be required to create a soil condition better than that which existed prior to surface mining;

APPENDIX B

STATE OF ILLINOIS

EXECUTIVE ORDER Number 4 (1980)

PRESERVATION OF ILLINOIS FARMLAND

The natural resources of Illinois—land, minerals, water, and air—are both finite and fragile. In the absence of wise use and consistent management practices, these resources are threatened by irreversible damage or loss. Protection of the State's natural resources is essential to guard the public health, safety, and welfare, and to assure an adequate natural resource supply and quality for use and enjoyment by future generations.

Since World War II, the amount of Illinois land dedicated to agriculture has steadily declined at an average rate of approximately 100,000 acres per year. This substantial loss of farmlands is the equivalent of eight average-sized Illinois counties. If this trend continues, the State will lose the equivalent of another five or six counties by the end of the century.

The conversion and loss of agricultural land has diminished Illinois' cropland base and affects environmental quality. The supply of land most suitable for farming is finite. Conversion of this land to urban development and other non-farm uses reduces future food production capability and may ultimately undermine agriculture as a major economic activity in Illinois. With less prime farmland available, there will tend to be greater reliance on marginally productive land, resulting in greater soil erosion, increased fertilizer requirements and increased environmental damage. Loss of agricultural land can also reduce the beneficial role which the land itself can play. Agricultural land reduces runoff by absorbing precipitation, aids in replenishing groundwater supplies and can buffer environmentally sensitive areas from encroaching development.

The importance of preserving our agricultural land base has been recognized by the Illinois Rural Planning Council, the Task Force on the Future of Illinois, and in the State's "Comprehensive Growth and Resource Conservation Policies". Each of these efforts recommends that the State minimize the conversion of prime farmland that results from the direct or indirect effects of State programs and also encourages the achievement of related goals, such as reducing the loss of soil through erosion.

Agencies of the Executive Branch perform numerous functions which affect the management of Illinois' natural resources, including the conversion of prime agricultural land. Decisions on State grants and capital improvements may have significant impact on the conversion process, yet often they may not adequately recognize that agricultural land is a finite resource that can be irretrievably diminished as a result of State actions.

Currently there is no single policy or coordinating mechanism to ensure that State actions do not unnecessarily encourage the conversion of prime farmland to non-farm uses, particularly when there may be alternatives available that are less destructive to our best agricultural lands.

Accordingly, I order the following:

I. It shall be the policy of the State of Illinois to protect, through the administration of its current programs and regulations, the State's prime agricultural land from irreversible conversion to uses which result in its loss as an environmental or essential food production resource.

II. The Department of Agriculture shall be the lead agency for implementing this policy in the State of Illinois.

A. The agencies named below shall each prepare and submit to the Governor, with a copy to the Illinois Department of Agriculture, an Agricultural Land Preservation Policy no later than one year from the effective date of this Executive Order. This policy shall include an analysis of the impact on agricultural

land conversions caused by their programs, regulations, procedures and operations. The policy shall also detail measures that can be implemented by the agency which will mitigate conversions to the maximum extent practicable. Each policy shall provide for a greater degree of protection for Classes I, II, and III lands than for Classes IV through VIII (as defined by the U.S. Department of Agriculture). The agencies are: Capital Development Board, Department of Conservation, Department of Commerce and Community Affairs, Environmental Protection Agency, Institute of Natural Resources, Department of Mines and Minerals, the Department of Transportation, Bureau of the Budget, and the Illinois Commerce Commission.

B. Those named State agencies shall participate in an inter-agency committee chaired by the Illinois Department of Agriculture to solve mutual problems in meeting the objectives of agricultural land preservation.

C. The Department of Agriculture will analyze State funded capital projects that impact farmland conversion and advise the Governor's Office as to the consistency of agency actions with the policy established by this Executive Order.

D. After the second anniversary of this Executive Order, all conversions of agricultural lands by any State agency shall meet the criteria specified in that agency's Agricultural Lands Preservation Policy.

III. EFFECTIVE DATE

This Executive Order shall become effective on July 22, 1980.

James R. Thompson
Governor

APPENDIX C

* * *

SENATOR PERCY:

I would like to submit for the RECORD a copy of a letter I received this morning from Mr. Douglas Downing, supervisor of the land reclamation division of Illinois' Bureau of Mines and Minerals, in which he affirms Illinois' total commitment to prime farmland reclamation and a 1982 grandfathering sunset.

* * *

STATEMENT TO SENATOR CHARLES PERCY FROM THE ILLINOIS DEPARTMENT OF MINES AND MINERALS ON PRIME FARMLAND AND CROPLAND RECLAMATION

The State of Illinois has consistently and historically advocated quality reclamation. We have every intention of promulgating and enforcing a law and regulations which carry out the requirements of P.L. 95-87. Two specific examples will prove that Illinois had the goal of good reclamation before the federal law was passed, and that we continue to impose requirements in excess of the federal law to insure retention of agricultural capability on the maximum number of acres.

First, in 1976, Illinois enacted Rule 1104, developed by soils scientists of international reputation from the University of Illinois and other Illinois schools. Rule 1104 has been adopted by the Illinois legislature for the permanent program, even though the federal law doesn't require it. During the permanent program, under Rule 1104 standards, operators will be required to return to rowcrop capability, land which does not meet the definition of prime farmland, but which is nevertheless

capable of producing rowcrops. By contrast, the federal regulations merely require that such land be revegetated. Since there are approximately 1,023,181 acres of land in Illinois mining counties which would be subject to Rule 1104 standards but not to prime farmland requirements, this means that Illinois would require a return to rowcrop capability for over one million acres more than would federal law alone.

Second, the State of Illinois was the originator of the idea to limit prime farmland grandfathering to 1982. Such a limitation has been placed on every single exemption granted by Illinois despite the fact that no time limitation is contained in the Federal Act or has ever been contained in adopted federal regulations. However, OSM has adopted this idea and is now proposing it as part of its proposed exemption regulations.

To date, Illinois has issued permits for approximately 2,700 acres upon which a prime farmland restoration plan has been submitted and approved. The federal prime farmland standards will apply. More acreage will be subject to these standards as time goes on, since Illinois has always interpreted the grandfather clause as a transition exemption only, as is obvious from the 1982 limitation. Of the acreage grandfathered by Illinois under the federal Act and regulations, only about 12,000 acres of it will actually be mined. Rule 1104 standards apply to grandfathered land. It's time that the facts be made known concerning the reclamation which will be required of grandfathered land in Illinois. The exempted land will have a minimum of eight inches of topsoil saved and replaced. Under the federal prime farmland rules, only a minimum of six inches would have to be saved and replaced. The entire rooting media of exempted land will be 4′ deep. Under the federal prime farmland rules, the rooting media would be 4′ also, unless there was a root inhibiting zone, or fragipan, within the premining surface 4′, in which case the prime farmland rules only require rooting media to the depth of the premining fragipan. Finally, the exempted land will have a

rooting media of a mixture of the B-C horizon. Under the prime farmland rules, a mixture of the B-C horizon is specifically allowed. The exempted land will be released from bond only when capability to achieve 90 percent of premining yield is shown.

Illinois is adopting the prime farmland standards and will enforce them, because there is a negligible difference between those standards and Rule 1104 standards, except for the many acres of fragipan soils in Southern Illinois. However, we will continue to apply Rule 1104 standards to restore the rowcrop capable land that is left out of the federal prime farmland requirements.

DOUGLAS DOWNING
Supervisor, Illinois Department of Mines and Minerals

* * *

FACT SHEET: GRANDFATHERING IN ILLINOIS

(Approximate acreage)

Total Acres Grandfathered[1] To Date (8/80) 29,903.
Prime Farmland Grandfathered, 16,059.
Prime Farmland Grandfathered which is planned to be mined, 12,143.
Federal Prime Farmland Restoration Plan—Approvals to Date (approximate acreage), 2,700.
Grandfathered land—1104 Reclamation Standards, Minimum of 8″ topsoil salvaged Root Zone 4′ deep.

[1] For convenience, exemptions are requested and granted or denied for entire permit areas, without specifically delineating prime farmland soils within the permit areas. In other words, this figure represents both prime farmland and non-prime farmland.

Federal Prime Farmland Reclamation Standards, Minimum of 6″ topsoil salvaged. Root zone 4′ deep, or less if root inhibiting zone, in which case root zone restored only to depth where premining root inhibiting zone existed.

Root zone of B/C mixture. Texture requirements for root zone: Maximum of 40% clay content.

Root zone B over C or B/C mixture. None.

Prime Farmland and Rule 1104 Land, Illinois Mining Counties (Approximate Acreage):

Prime Farmland, 2,049,800.

Row Crop in Excess of Prime Farmland, 1,025,181.

Prime Farmland Plus Row Crop, 3,074,981.

* * *